

**Alaska Department of Environmental Conservation
Response to Comments**

For

**Vessel and Small Vessel General Permits Section 401
Certifications**

**Public Noticed: May 17, 2012 – June 15, 2012
&
August 22, 2012 – September 20, 2012**

September 28, 2012



**Alaska Department of Environmental Conservation
Wastewater Discharge Authorization Program
555 Cordova Street
Anchorage, AK 99501**

1 Introduction

1.1 Summary of Permit

In December 2003, a long-standing exclusion of discharges incidental to the normal operation of vessels from the National Pollutant Discharge Elimination System (NPDES) program became the subject of a lawsuit in the U.S. District Court for the Northern District of California (*Northwest Env'tl. Advocates et al. v. United States Environmental Protection Agency*, 2005). On March 30, 2005, The U.S. District Court for the Northern District of California determined that the exclusion exceeded the Environmental Protection Agency's (EPA) authority under the Clean Water Act (CWA). The Court issued a final order providing that the blanket exemption for discharges incidental to the normal operation of a vessel, contained in 40 CFR 122.3(a), shall be vacated as of September 30, 2008.

EPA appealed the District Court's decision to the Ninth Circuit, and on July 23, 2008, the Court upheld the decision (*Northwest Env'tl. Advocates v. EPA*, Ninth Circuit 2008). This meant that effective December 19, 2008, except for those vessels exempted NPDES permitting by Congressional legislation (i.e. recreational boaters as defined in CWA(o); and, based on a temporary moratorium which is set to expire on December 18, 2013, 1) non-recreational vessels less than 79 feet in length and 2) commercial fishing vessels as defined in 46 U.S.C. § 2101), discharges incidental to the normal operation of vessels which were excluded from NPDES permitting by 40 CFR 122.3(a), were subject to CWA Section 310's prohibition against discharging, unless covered under an NPDES permit.

In response to the court decisions, EPA issued the Vessel General Permit (VGP) in December 2008 for a five year permit cycle. (Note the Alaska Department of Environmental Conservation [DEC or the Department] did not provide a Section 401 certification of the 2008 EPA-issued VGP.) The EPA-issuance of the 2008 VGP was challenged by several groups in 2009. EPA reached settlement with many of these groups in March of 2011. For the groups that EPA did not reach settlement, litigation proceeded to briefing over whether EPA was required to public notice state Section 401 certifications; however, the Court denied the petition for review indicating public noticing of state Section 401 certifications were up to the states.

Currently, EPA is in the process of reissuing the VGP and issuing the Small Vessel General Permit (sVGP) to provide a NPDES permitting mechanism for those discharges whose moratorium from needing NPDES coverage (as discussed above) is set to end on December 18, 2013. The two permits cover categories of incidental vessel discharges into the waters of the U.S. The VGP regulates the following 27 categories of discharges:

- Deck Washdown and Runoff and Above Water Line Hull Cleaning
- Bilgewater/Oily Water Separator Effluent
- Ballast Water
- Anti-fouling Hull Coatings and Hull Coating Leachate

- Aqueous Film Forming Foam
- Boiler/Economizer Blowdown
- Cathodic Protection
- Chain Locker Effluent
- Propeller and Hydraulic Maintenance and Other Oil-to-Sea Interfaces
- Distillation and Reverse Osmosis Brine
- Elevator Pit Effluent
- Firemain Systems
- Freshwater Layup
- Gas Turbine Washwater
- Graywater
- Motor Gasoline and Compensating Discharge
- Non-oily Machinery
- Refrigeration and Air Condensate Discharge
- Seawater Cooling Overboard Discharge
- Seawater Piping Biofouling Prevention
- Boat Engine Wet Exhaust
- Sonar Dome Discharge
- Underwater Ship Husbandry Discharges
- Weldeck Discharges
- Graywater Mixed with Sewage from Vessels
- Exhaust Gas Scrubber Washwater Discharge
- Fish Hold Effluent (New).

Only one new discharge category has been added to this VGP issuance from the previously issued 2008 VGP. The new discharge category is Fish Hold Effluent. In addition, the VGP sets more stringent requirements for ballast water discharges and oil-to-sea interfaces.

The sVGP regulates the following 10 management areas:

- General Management
- Fuel Management
- Engine Oil Control
- Solid and Liquid Waste Management
- Deck Washdown and Runoff and Above Water Line Hull Cleaning
- Vessel Hull Maintenance
- Graywater
- Fish Hold Effluent
- Ballast Water
- Seawater Cooling Overboard Discharge.

1.2 Opportunities for Public Participation

DEC proposed to issue two CWA Section 401 Certifications (certifications) to provide State of Alaska Section 401 certification of the VGP and sVGP. To ensure public opportunities for participation, the Department:

- posted draft certifications online for a 30-day public comment period on May 17, 2012 and notified other agencies
- notified other agencies and sent notice via the APDES Program List Serve on June 16, 2012 that it was withdrawing the draft certifications in order to clarify language in the cover letter and the certifications
- formally published public notice of the draft certifications in the Juneau Empire on both August 23 and 24, 2012; in the Anchorage Daily News on August 22, 2012; and the Dutch Harbor Fisherman on August 30, 2012; and, posted the draft certifications online for a 30-day public comment period on August 22, 2012 in addition to notifying other agencies
- sent email notifications via the APDES Program List Serve when the draft final certifications were available for review
- posted the final certifications online on September 28, 2012.

During the first public comment period, the Department received comments from four interested parties on the draft certifications. During the second public comment period, the Department received comments from two interested parties on the draft certifications. The Department also requested comment from the Alaska Departments of Natural Resources and Fish and Game, the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and EPA. No comments were provided by the aforementioned agencies.

This document summarizes the comments submitted and the justification for any action taken or not taken by DEC in response to the comments.

1.3 Final Permit

The final certifications were adopted by the Department on September 28, 2012. There were minor changes from the August 22, 2012 public noticed certifications. Changes are identified in this response to comments document and reflected in the final certifications.

2 General Summary of Comments Received

With respect to the first set of public noticed draft certifications (public noticed on May 17, 2012), the Department received comments of general concern and opposition to certain conditions included in the certifications. In general, common themes included: concerns over dilution allowances and restrictions both while underway and stationary and how those conditions may conflict with Alaska state law (Alaska Statute 46.03.462), confusing appeal language in the certifications' cover letters, the implementation of numeric water quality criteria in the certifications for the non-numeric Best Management Practices (BMP)-based VGP and sVGP, the uses of phrases like "Permittees are responsible for controlling discharges as necessary to meet water quality standards (WQS), including discharges to impaired waters...", concerns that it is difficult for operators to know what technologies they must employ to meet certification conditions without conducting expensive and extensive testing, and requests to certify the VGP without additional conditions or without reference to WQS.

With respect to the second set of public noticed draft certifications (public noticed on August 22, 2012), the Department received comments thanking DEC for the work on certifications but still voicing general concern and opposition to certain conditions included in the certifications. In general, common themes include: the uses of phrases like “Permittees are responsible for controlling discharges as necessary to meet WQS, including discharges to impaired waters...”, the requirement to notify EPA if operating in impaired water bodies, concerns that it is difficult for operators to know what technologies they must employ to meet certification conditions without conducting expensive and extensive testing, and to certify without referencing WQS.

Response:

As stated above, DEC withdrew the May 17, 2012 draft certifications prior to the closing of the public comment period. Prior to withdrawal, DEC received comments from four interested parties (as summarized above). Many of the concerns raised in the subject comments were addressed in the August 22, 2012 draft certifications and are therefore not discussed here.

While many of the comments submitted during the first public comment period were addressed, some were not, and some of the same or similar-type comments were resubmitted during the second public comment period (as summarized above). In general, DEC acknowledges that the EPA issuance of the VGP and sVGP in conjunction with DEC's certifications creates a complicated, and in some cases, an overlapping legal structure for operators in Alaska; however, DEC finds it necessary to certify the EPA permits with conditions to protect water quality as defined in 18 AAC 70. With respect to the comments submitted during the August 2012 public comment period, DEC provides the following comment summaries and responses.

3 Summary of Comments Mainly Focused on Condition 1 of the Certifications

In summary, Condition 1 in both certifications requires that all discharges authorized by either the VGP or sVGP in state waters not result in violation of WQS (18 AAC 70) in the water body. In the VGP certification, DEC provides the rationale that vessel operators must treat wastewater and/or implement the BMPs in the VGP to ensure discharges comply with applicable WQS. In the sVGP certification, DEC provides the rationale that vessel operators must implement the BMPs in the VGP to ensure discharges comply with applicable WQS.

Commenter's state the conditions put an infeasible demand on vessel operators as they would have need to know both the amount of restricted pollutants in the water body into which their vessels are discharging and the amount of restricted pollutants present in their vessels' discharges. This lack of data regarding constituent's in discharges makes it currently impossible to know what technologies dischargers must employ to meet WQS in a particular water body, and that the gathering of this data would require extensive, and expensive, discharge sampling and analysis without an understanding of whether applicable technologies are Coast Guard-approved and commercially viable. Accordingly, the commenter urges DEC to remove its references to WQS in its draft certification conditions 1 and 3. In addition, the commenter also urges DEC to rewrite its certification conditions as BMPs to ensure that compliance with its conditions is feasible for operators.

Response:

Implicit to the Department certifying the BMP-based VGP/sVGP without adding numeric effluent limits or requiring effluent monitoring in its certifications, the Department is certifying that if the VGP and sVGP are adhered to while operating in Alaska waters, there is reasonable assurance that Alaska water quality criteria will be met in the water body.

It is necessary for DEC to reference WQS in portions of the certifications as the CWA Section 401 Certification process specifically provides Alaska a legal mechanism to protect surface water quality, which is explicitly protected via Alaska's WQS codified in 18 AAC 70; however, within the context of 18 AAC 70 as a whole, DEC has determined that the correct phrase to use in Condition 1 of the certifications is "water quality criteria" as opposed to the use of the broader "WQS". It is important to note that water quality criteria apply to the water body.

4 Summary of Comments Mainly Focused on Condition 3 of the Certifications

In summary, Condition 3 in both certifications states that "permittees are responsible for controlling discharges as necessary to meet WQS, including discharges to impaired waters." The conditions further indicate that permittees must be aware of the status of the water bodies they are traveling, specifically whether the water bodies are listed as impaired and whether a total maximum daily load has been implemented. DEC provides the rationale that in order to ensure WQS are met, knowledge of the water body's status is essential prior to discharge activity. Permittees are responsible for self-identifying water bodies where discharges are prohibited or restricted by accessing the CWA 303(d) list of impaired waters or the State's most current Integrated Water Quality Monitoring and Assessment Report (Integrated Report). Further, permittees are directed to contact EPA immediately if they plan to discharge in impaired water bodies.

A commenter requests that any time the conditions reference WQS, the phrase "in the receiving waters..." be included. In addition, the commenter suggests the language regarding contacting EPA be removed as the EPA draft VGP does not include such a requirement.

Response:

As previously discussed in this Response to Comment document, DEC is removing references to "WQS" in Condition 1 of the certifications and replacing it with the phrase "water quality criteria" in the water body.

DEC is removing all references to WQS in Condition 3 as that language is duplicative of Condition 1. The main intent of Condition 3 is to inform authorized operators that impaired waters are present in Alaska and that it is their responsibility to know when they are operating in those waters, as specific pollutant loading restrictions may exist in these water bodies. DEC is in the process of finalizing its 2012 Integrated Report, which compiles Alaska's list of impaired 303(d) listed water bodies. Until the Report is finalized, operators can locate the draft 2012 Integrated Report online here: <http://dec.alaska.gov/water/wqsar/waterbody/integratedreport.htm>.

Regarding the requirement to contact EPA, Condition 3 will be rewritten as follows:

- “3) Permittees must be aware of the status of the water bodies they are traveling through, specifically whether the water bodies are impaired and have, or do not have, an EPA-approved Total Maximum Daily Load implementation plan prepared under CWA 303(d).

Rational: The location of impaired waters of the United States must be known prior to the discharge activity. The permittees are responsible for identifying areas where discharges are prohibited, including accessing CWA 303(d) list of impaired waters or the State's most current Integrated Water Quality Monitoring Report and Assessment Report.